would not be co-extensive,[19] it is conceived that the civil liability would not outrun the criminal on the facts of the principal case; the view taken by the court.

THE RIGHT TO DISBAR AN ATTORNEY FOR MISCONDUCT TOWARD THE COURT.—Since an attorney's right to practice is a mere license,[1] the right to disbar of course exists as a necessary incident in any court having the power to license,[2] although by the weight of authority this right of abrogation is inherent in any court of record.[3]

The nature of the attorney's misconduct toward the court which will warrant disbarment, it is submitted, can always be classified under one or more of the following tests. (1) The subjective test in respect to the attorney: any act which establishes his moral delinquency in a professional capacity, as inciting his clients to bring newspaper pressure to bear on the judges;[4] or even in his private capacity, if the act be of a sufficiently criminal nature, such as encouraging a felony.[5] (2) The subjective tests as to the courts: (a) any conduct which tends to destroy their impartiality in rendering a decision in a pending cause, if intended to effect such a result,[6] such as writing a letter to the judge accusing him of having withheld, because of corporate influence, a decision previously written in favor of the attorney's client,[7] or (b) any conduct which shows lack of due respect for the court,[8] such as personally accusing a judge of malfeasance in a judicial capacity,[9] the intent being presumed from the act.[10] (3) The objective tests in respect to both the court and the attorney: any conduct tending to impair popular confidence in the courts,[11] such as publicly charging a conspiracy between the judge and the opposing counsel, where again actual intent is immaterial.[12] Although these tests are constantly intermingled and sometimes confused by the courts, it is conceived that they are distinct.

In the recent case of *In re Thatcher* (Ohio 1909) 89 N. E. 39, an attorney, in a libellous pamphlet criticized the past decisions and impugned the integrity of a judge who was a candidate for re-election, and the court considered that the attorney's conduct evinced moral turpitude and lack of due respect sufficient to justify disbarment. Although the result reached cannot be attacked, since the degree of conduct warranting disbarment rests so largely in the discretion of the court,[13] the case raises the salient

[19]Insanity, for example, may relieve the defendant of criminal though not of tort liability.

[1]Bradwell *v.* State (1872) 16 Wall. 130.
[2]*In re* Murray (1890) 11 N. Y. Supp. 336.
[3]*In re* Simpson (1900) 9 N. D. 379.
[4]*Ex parte* Cole (Ia. 1879) 1 McCrary 405, 408.
[5]*Ex parte* Wall (1882) 107 U. S. 265.
[6]Case of Austin (Pa. 1835) 5 Rawle 191.
[7]Smith's Appeal (1897) 179 Pa. St. 14.
[8]Bradley *v.* Fisher (1871) 13 Wall. 335.
[9]Johnson *v.* State (1907) 152 Ala. 93.
[10]People *v.* Green (1887) 7 Col. 237, 241.
[11]*In re* Mains (1899) 121 Mich. 603.
[12]*In re* Snow (1904) 27 Utah 266.
[13]Scouten's Appeal (1898) 186 Pa. St. 270.

point of how far the constitutional guaranty of freedom of speech will operate in protecting an attorney or a citizen in his criticism of the courts.

If there has been a final determination of the cause, the courts apparently do not attempt to apply the foregoing tests (applicable in pending actions) in cases where the criticism has been addressed to third persons, as in the case under discussion. They clearly accord to the attorney, in spite of his official oath, all of the constitutional privileges which any citizen possesses.[14] Although some jurisdictions grant absolute immunity, at least in contempt proceedings,[15] others reserve the right to disbar if the manner of criticism evinces moral turpitude.[16] The reasons assigned all fall under the broad head of public policy, and are as follows: that an attorney, by entering his profession, does not forfeit his rights as a citizen;[17] that, moreover, if the judiciary be elective, there is a positive duty devolving upon the profession to speak out, since they as a class are best fitted to know the candidate's qualifications;[18] that, since the cause is no longer pending, such criticism cannot influence the impartiality of the decision;[19] that the opinion when once given becomes public property open to the scrutiny of any citizen;[20] that respect to the courts cannot be compelled;[21] and that, since as a citizen the judge has adequate civil or criminal remedies, if the criticism by the attorney or citizen be libellous, to allow the court the arbitrary exercise of the power to disbar for criticism of court rulings, would tend more to impair the confidence of a public accustomed to the right to criticise the acts of its officers to the fullest extent, that even unjust or malicious criticism by an attorney in his status as a citizen.[14] The higher courts fully recognize the essential expediency of this doctrine by applying it to protect the attorney[22] or citizen[23] whom a lower court has attempted to discipline for contempt. When, however, the criticism is personally addressed to the judge, the reasons of public policy, outlined above, no longer apply. Therefore, in this class of cases, the courts resort to the original tests, irrespective of whether or not the cause has been finally determined.[24] The cases on contempt also recognize this distinction,[25] and *In re Breen*[26] narrows the doctrine of *In re Hart* to criticism primarily addressed to the judge with the intention of insulting him, although also open to inspection by the public at large.

Inasmuch as in *In re Thatcher* the attorney's criticism apparently was of the judge's attitude in causes finally determined, and upon which the

[14]*In re* Hart (1908) 104 Minn. 88; People *v.* Green (1883) 7 Col. 244.

[15]State *v.* Kaiser (1890) 20 Ore. 50.

[16]State *v.* McClaugherty (1889) 33 W. Va. 250.

[17]Austin's Case *supra.*

[18]*Ex parte* Steinman (1880) 95 Pa. St. 220.

[19]State *v.* Anderson (1875) 40 Ia. 207 (Contempt).

[20]State *v.* Dunham (1885) 6 Ia. 245 (Contempt).

[21]Stuart *v.* People (1842) 4 Ill. 395 (Contempt). The citation of the foregoing cases involving only a question of contempt may be justified by the analogy which the court in *In re Hart supra* adopts by citing the same indiscriminately with cases on disbarment.

[22]State *v.* Circuit Court (1897) 97 Wis. 1; *contra, In re* Chadwick (1896) 109 Mich. 588.

[23]State *v.* Kaiser *supra; contra,* Burdett *v.* Comw. (1904) 103 Va. 838.

[24]Matter of Manheim (N. Y. 1906) 113 App. Div. 136; *In re* Griffin (1888) 1 N. Y. Supp. 7.

[25]*Ex parte* McLeod (1903) 120 Fed. 406; Comw. *v.* Dandridge (1824) 2 Va. Cas. 408.

[26](Nev. 1908) 93 Pac. 997.

latter voluntarily based his claim for re-election, and was not primarily addressed to the judge in person, the doctrine of that case would hardly seem in accord with the principles of public policy advanced in *In re Hart.*[14] The decision may be sustained, however, on the ground of moral turpitude pointed out in *State* v. *McClaugherty,*[16] or possibly on the New York view[27] that the attorney's sole remedy is to institute impeachment proceedings.

RULES LIMITING FUTURE ESTATES, IN ENGLAND.—The rule against perpetuities in England to-day seeks *generally* to prevent remote vesting of future interests. Its application to executory devises, springing and shifting uses, powers, rights of entry for condition broken,[1] and the perpetual right, by covenant, of pre-emption[2] to the fee, in the vendor of realty, and his assigns, has been recognized. Its application to contingent remainders, however, has been much disputed. Legal contingent remainders have divided the authorities. Against the application of the rule it is argued that the recognition of the validity of contingent remainders antedated the estates which called the rule against perpetuities into existence and against which it was aimed.[3] Further, it is argued that such remainders were subject to an independent rule which grew out of the old rule against double possibilities; that a remainder to an unborn person could not be followed by a remainder to his unborn son.[3] Against this rule and in favor of the rule against perpetuities it is urged that contingent remainders and executory devises gained recognition simultaneously, that remoteness as a vice was unknown in early common law, that no trace of any accepted independent rule existed while the rule against perpetuities was being formulated and that the latter embraced common law interests.[4]

In *Whitby* v. *Mitchell,*[5] decided in 1889, the court faced the situation squarely, and held void a remainder to an unborn child following a remainder to his unborn parent, limited, however, to vest within lives in being, on the ground that it offended against the rule against double possibilities. A recent English case, *In re Nash* (1909) 78 L. J. R. 78 Ch. Div. 657, has extended the doctrine to similar equitable limitations. If the holding in *Whitby* v. *Mitchell* means that the rule against double possibilities must be applied to legal contingent remainders to prevent remoteness of vesting for the reason that the rule against perpetuities has no application to such interests, the case lends no support to the instant decision. So-called equitable contingent remainders have been declared subject to the rule against perpetuities[6] for the reason that they need not vest immediately upon the determination of the preceding estate because the seisin in the trustees supports them, and the freehold is not in abeyance.[7]

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[27]Matter of Manheim *supra.*

[1]*In re* Macleay (1875) L. R. 20 Eq. 186; Dunn *v.* Flood (1882) L. R. 25 Ch. Div. 629; *In re* Hollis' Hospital L. R. [1899] 2 Ch. 540.

[2]London & S. W. Ry. *v.* Gomm (1880) L. R. 20 Ch. Div. 562. See 7 COLUMBIA LAW REVIEW 406.

[3]Williams, Real Property (6th Ed.) 271; 15 L. Q. R. 71; 14 L. Q. R. 133.

[4]14 L. Q. R. 234; 6 L. Q. R. 410; Gray, Perp. (2 ed.) §§284-299 and 321b.

[5]L. R. 42 Ch. D. 494.

[6]*In re* Hargreaves (1889) L. R. 43 Ch. D. 401; Abbiss *v.* Burney (1881) L. R. 17 Ch. Div. 211.

[7]Hopkins *v.* Hopkins (1738) 1 Atk. 581.